

Exhibit N

Highly Confidential - Robert Kaplan

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

		Civil Action No.
		5:16-cv-10444
In re: FLINT WATER CASES		
		Hon, Judith E. Levy
		Mag. Mona K. Majzoub

HIGHLY CONFIDENTIAL
Thursday, January 13, 2022
Volume I

Remote videotaped deposition of
ROBERT KAPLAN, conducted at the location of the
witness, commencing at 9:04 a.m., on the above date,
before Carol A. Kirk, Registered Merit Reporter,
Certified Shorthand Reporter, and Notary Public.

GOLKOW LITIGATION SERVICES
877.370.3377 ph | 917.591.5672 fax
deps@golkow.com

1 R E M O T E A P P E A R A N C E S

2 - - -

3 On behalf of the Class and Burgess Plaintiffs:

4 JULIE H. HURWITZ, ESQUIRE
GOODMAN, HURWITZ & JAMES, P.C.
5 1394 East Jefferson Avenue
Detroit, Michigan 48207
6 313-567-6170
jhurwitz@goodmanhurwitz.com

7
CARY S. MCGEHEE, ESQUIRE
8 PITT MCGEHEE PALMER BONANNI & RIVERS, PC
117 West Fourth Street, Suite 200
9 Royal Oak, Michigan 48067
cmcgehee@pittlawpc.com

10
LESLIE M. KROEGER, ESQUIRE
11 COHEN MILSTEIN SELLERS & TOLL PLLC
11780 U.S. Highway 1 North, Suite N500
12 Palm Beach Gardens, Florida 33408
561-515-1400
13 lkroeger@cohenmilstein.com

14
On behalf of Individual Plaintiffs:

15
DONALD H. DAWSON, JR., ESQUIRE
16 ALEC E. OHRYN, ESQUIRE
FIEGER LAW
17 19390 West Ten Mile Road
Southfield, Michigan 48075-2463
18 248-355-5555
d.dawson@fiegerlaw.com
19 a.ohryn@fiegerlaw.com

20
21
22
23
24

1 R E M O T E A P P E A R A N C E S (CONT'D)

2 - - -

3 On behalf of Individual Plaintiffs:

4 PATRICK LANCIOTTI, ESQUIRE

NAPOLI SHKOLNIK PLLC

5 400 Broadhollow Road, Suite 305

Melville, New York 11747

6 631-224-1133

planciotti@napolilaw.com

7

8 On behalf of the People of the State of Michigan:

9 CHARLES A. CAVANAGH, ASSISTANT ATTORNEY GENERAL

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL

10 525 West Ottawa Street, 6th Floor

Lansing, Michigan 48909

11 517-335-7664

cavanaghc2@michigan.gov

12

13 On behalf of Defendants Veolia Water North America
Operating Services, LLC, Veolia North America, LLC,
14 and Veolia North America, Inc.:

15 CHRISTOPHER R. HOWE, ESQUIRE

CAMPBELL CONROY & O'NEIL, P.C.

16 1 Constitution Wharf, Suite 310

Boston, Massachusetts 02129

17 617-241-3000

chowe@campbell-trial-lawyers.com

18

SARAH E. BALKISSOON, ESQUIRE

19 MAYER BROWN, LLP

Two Palo Alto Square

20 3000 El Camino Real

Palo Alto, California 94306

21 650-331-2000

sbalkissoo@mayerbrown.com

22

23

24

1 R E M O T E A P P E A R A N C E S (CONT'D)

2 - - -

3 On behalf of Defendants Leo A. Daly Company and
4 Lockwood, Andrews & Newnam, Inc.:

5 PHILIP A. ERICKSON, ESQUIRE
6 PLUNKETT COONEY, P.C.
7 325 East Grand River
8 City Center, Suite 250
9 East Lansing, Michigan 48823
10 517-333-6598
11 perickson@plunketcooney.com

12 On behalf of McLaren Regional Medical Center:

13 SUSAN E. SMITH, ESQUIRE
14 BEVERIDGE & DIAMOND, P.C.
15 456 Montgomery Street, Suite 1800
16 San Francisco, California 94104
17 1-415-262-4000
18 ssmith@bdlaw.com

19 On behalf of the United States of America:
20 MICHAEL L. WILLIAMS, ESQUIRE
21 JASON T. COHEN, ESQUIRE
22 U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
23 175 N. Street, N.E.
24 Washington, D.C. 20002
202-307-3839
michael.l.williams@usdoj.gov
jason.t.cohen@usdoj.gov

25 - - -

26 Also Present:

27 Francis X. Ferrara, Veolia
28 Jeff Sindiong, Videographer

29 - - -

1 A. The person I dealt with most was
2 Tom Poy. I can't give you his official title.
3 I'd have to look back and see from his
4 deposition, but that's the person I dealt with
5 with regard to enforcement and safe drinking
6 water.

7 Q. Okay. As an acting regional
8 administrator from 2016 -- January of 2016 to
9 January 2018, would it be fair to say that you
10 were responsible for implementing federal
11 environmental programs within Region 5?

12 A. Yes.

13 Q. Could you please describe for me
14 generally the job duties and responsibilities of
15 the deputy regional administrator to the extent
16 they're any different than the regional
17 administrator.

18 A. It varies from regional
19 administrator to regional administrator greatly,
20 I'd say.

21 The DRA or deputy regional
22 administrator is the highest level career person
23 in the regional office. So that person usually
24 has administrative supervision of all of the

1 employees that report to the regional
2 administrator.

3 So there are about 1,000 employees
4 in Region 5. So all of those would be under the
5 administrative purview of the DRA. So it's
6 basically implementation and budget execution
7 with supervisory responsibility as well.

8 When I say it varies with regional
9 administrators, some regional administrators
10 focus on just a couple of substantive areas and
11 leave the rest to the DRA. Some have a quite
12 expansive interpretation of their role and leave
13 a small amount, making the trains run on time,
14 for example, to the DRA. It expands and
15 contracts based on the person who occupies that
16 position.

17 Q. Okay. And as a deputy regional
18 administrator for Region 5, from -- you served
19 as deputy regional administrator for Region 5
20 from January 2015 to January 2016; is that
21 right?

22 A. I believe that's right, before I
23 became acting regional administrator.

24 Q. And as deputy regional

1 administrator for Region 5, would it be fair to
2 say that you assisted the regional administrator
3 and supervised the day-to-day operations of the
4 region staff?

5 A. Generally, that statement is true.

6 Q. Okay. Prior to serving as deputy
7 regional administrator, what position did you
8 hold?

9 A. I was the regional counsel.

10 Q. And for what period of time did
11 you serve as regional counsel?

12 A. I was brought in in 2007 in an
13 acting capacity, and I believe 2008 was my
14 official start date as the appointed regional
15 counsel in Region 5.

16 Q. Okay. And so it would be fair to
17 say that you've served in various positions for
18 Region 5 beginning in February 2007?

19 A. I believe that's right.

20 Q. You've served as a deputy --
21 you've served as deputy counsel -- I'm sorry.

22 You've served as regional counsel,
23 deputy regional administrator, and acting
24 regional administrator, correct?

1 VNA's subpoena to the EPA.

2 What did you do to prepare
3 yourself to testify with respect to that topic,
4 topic number 46, as it relates to the EPA's
5 Emergency Administrative Order?

6 A. I reviewed the order. I reviewed
7 the testimony that I already indicated. I
8 reviewed the timeline. And I also spoke with
9 Cynthia Giles, who was the assistant
10 administrator for OECA at the time.

11 I spoke with Susan Hedman, former
12 regional administrator. And I spoke with Mark
13 Pollins, who was the division director of the
14 water enforcement division at headquarters.

15 Q. And what was the -- based on your
16 discussions with those individuals that you just
17 identified, what was the reason -- what was the
18 reason for EPA's decision to issue an Emergency
19 Administrative Order for the City of Flint?

20 A. It was multi-part and several
21 different reasons, but I'll enumerate some of
22 them.

23 The first and probably most
24 pressing reason was there had been a lack of

1 cooperation over time with Michigan. What
2 started out to be a partnership where we made a
3 request and Michigan executed it, gradually grew
4 into a more fractious relationship where
5 Michigan and Flint were both not complying with
6 our requests. That became more evident from
7 December into January.

8 I'd say that was the primary
9 reason for it. It's always a strategic call
10 when to issue such an order. And as I was
11 talking to all the actors involved, they all
12 said the same thing, which is they wanted all
13 the things that needed to happen in Flint to
14 proceed as quickly as possible. They wanted to
15 choose the most effective tool to ensure that
16 they happened as quickly as possible.

17 The balance shifted from December
18 and on into January, especially with regard to
19 the cooperation and lack thereof of the City of
20 Flint and the State of Michigan.

21 Q. You indicated in your answer that
22 the state agency was not complying with EPA's
23 requests, correct?

24 A. Correct.

1 Q. What specifically are you
2 referring to there?

3 A. So I should have also included
4 myself in the person I spoke with to prepare,
5 because I was in some sense a witness to this.
6 I headed up what was called at the time the
7 Flint Task Force.

8 And the Flint Task Force was a
9 group of scientific professionals that were
10 brought together to provide advice to Flint on a
11 number of matters from sampling to treatment and
12 operation of the facility.

13 And in order to do our work, we
14 needed to make certain requests to Flint, and
15 those requests needed to be answered timely.

16 And it became increasingly clear
17 to me that Flint was either unwilling or
18 uncapable of providing that information to us as
19 we proceeded into January.

20 There were a number of instances
21 where we requested things like placement of lead
22 lines, where the lead lines were, that they were
23 unable or unwilling to provide as far as
24 information.

1 There were other times where we
2 made requests and were provided with information
3 that seemed to border on incompetence. So, for
4 example, we made a request to them about
5 chlorine residuals. And they said -- the plant
6 operator who was on the phone said, "You know,
7 we ordered that pump a while ago and I'm not
8 sure where it is."

9 And that rang alarm bells for us
10 that the plant at the time -- on collateral
11 issues, on issues that weren't before us, lead
12 and copper necessarily, was not being run in
13 such a way that would assure us confidence going
14 forward.

15 So those requests and the
16 responses that were inadequate or perhaps
17 incompetent to our requests guided our
18 determination that Flint and MDEQ were not being
19 responsive.

20 Q. And as a result of that, those
21 discussions, a determination was made to issue
22 an Emergency Administrative Order?

23 A. There was -- that's correct.
24 Those are the principal reasons, but there are

1 others. If I can add --

2 Q. Yeah. What are the others that
3 you're referring to?

4 A. One other reason was, as we've
5 spoken about, there was a -- this was the first
6 of another second contemplated water switch.
7 And the first one had been mismanaged in many
8 respects. And the system and the people of
9 Flint couldn't afford another mismanaged water
10 switch.

11 A water switch, as we all know, is
12 a very complicated endeavor in the best of times
13 for a city of this size and with a treatment
14 plant of this age, and we wanted to assure that
15 going forward, this water switch was managed in
16 an appropriate way.

17 That was another reason that we
18 thought prospectively it was very important to
19 make sure that the water switch proceeded in a
20 way that would give us confidence that the
21 people of Flint would be protected.

22 Another reason had to do with
23 chlorine. And, again, as part of the work of
24 the task force, we started to get increasing

1 concerns that there was not adequate chlorine
2 residual in the City of Flint.

3 And even though the testing as
4 required by regulation was coming up that there
5 was adequate chlorine residual during this time
6 period, we had our doubts going forward.

7 And in talking to some of the
8 scientists on my task force, we were very
9 concerned as we proceeded in January. Chlorine
10 dissipates with warm water. As we headed into
11 spring, we wanted to make sure that we were
12 prepared for all the disinfection that needed to
13 happen in Flint. So we included a provision on
14 chlorine and disinfection.

15 We also became concerned, as I
16 indicated, about the technical, managerial, and
17 financial capabilities of the City of Flint to
18 get the job done. And we decided that at this
19 point, we needed to ensure that Flint had the
20 TMF, technical, managerial, and financial
21 ability to do all the things that they needed to
22 do. And the order was intended to guide that
23 effort.

24 Q. And the order was issued pursuant

1 Do you see that?

2 A. I do.

3 Q. And she responded that she did
4 consider him an expert, correct?

5 A. Yes.

6 Q. And then she's asked why -- if she
7 received information in September, including the
8 fact that children had elevated blood lead
9 levels, why she didn't act until January 21,
10 2016.

11 Do you see that?

12 A. I do.

13 Q. And she disputes that and says
14 that the rep was incorrect in stating that the
15 EPA did not act, correct?

16 A. That's right.

17 Q. And aside from the emergency order
18 that EPA issued in January 2016 requiring MDEQ
19 and/or the City of Flint to immediately install
20 corrosion control treatment in Flint, what did
21 the EPA -- what actions did the EPA take prior
22 to January 2016 to require corrosion control
23 treatment in the City of Flint?

24 MR. WILLIAMS: Objection; asked

1 and answered.

2 A. There were a number of them,
3 starting with Miguel Del Toral's work. There
4 were a whole series of actions that EPA took
5 that got elevated through the chain as a request
6 MDEQ to change course on corrosion control. And
7 ultimately we were successful in getting them to
8 change course on corrosion control faster than
9 any other mechanism available to us. By
10 August 17, they had changed course on corrosion
11 control.

12 And then if you look to the end of
13 September -- and that's the time period that's
14 referenced by the representative -- there was a
15 10-point plan that came out by the State of
16 Michigan. That 10-point plan was worked in
17 coordination with EPA at every step, with EPA
18 urging and amending action in close consultation
19 with headquarters.

20 And then, of course, the most
21 important thing was to get the water source
22 switched back. So in terms of corrosion
23 control, it factors in because the Flint River
24 would be a very difficult river or source of

1 water to come up with a plan for corrosion
2 control.

3 The fact that it was switched
4 earlier than any other mechanism available to us
5 and more surely in mid October, and then for
6 better odds on corrosion control.

7 So I would agree that the
8 administrator answered that question correctly.

9 Q. On page 32 of her congressional
10 testimony, Ms. McCarthy is asked whether the EPA
11 did anything wrong.

12 Do you see that?

13 A. I do.

14 Q. And in response, she testified, "I
15 don't know whether we did everything right.
16 That's the challenge that I'm facing."

17 Do you see that?

18 A. I do.

19 Q. And then after that, Chaffetz
20 follows up and says, "And my question is: Did
21 the EPA do anything wrong?"

22 Do you see that?

23 A. I do.

24 Q. And Ms. McCarthy responds, "I

1 Q. And so under Section 1431 of the
2 SDWA, those two conditions were met, correct?

3 A. You're asking whether
4 jurisdictionally we could have issued it?

5 Q. Yes.

6 A. We could have issued it at many
7 different times, including --

8 Q. When do you think -- when was the
9 earliest that you believe that the EPA could
10 have issued an emergency order under
11 Section 1431 of the SDWA?

12 A. So it's always a balance in terms
13 of litigation risk, because you want the order
14 to be complied with and defensible in court.
15 And if you look at what was happening at the
16 time, if you go back to July, the evidence
17 before the agency was we had a reading of
18 6 parts per billion in January, and then we had
19 a reading in July of 11 parts per billion. So
20 those two things -- those two readings are below
21 the action level.

22 We also had an indication that
23 there was extremely high lead in a house in
24 Flint. We also had an indication in that report

1 that there was construction on the street at the
2 time, and there were a number of different
3 photos of construction in the street.

4 And according to Miguel Del Toral,
5 it's well-known that construction can release
6 particulate lead, which leads to the sorts of
7 high lead levels that you'd expect to see in
8 that one home. So we know that they're not
9 doing appropriate corrosion control or any
10 corrosion control at that time period too.

11 So you add all that up together,
12 and it looks like a number of different
13 jurisdictions that had levels below the action
14 level. So there are tens of thousands of those
15 across the country.

16 The LCR itself, when you do LCR
17 sampling, allows for up to 10 percent of the
18 homes to be above the action level and still you
19 have no action level exceedance. You don't
20 invoke all the protections of the act.

21 So my sense was in July, it would
22 not have been appropriate to issue the order. I
23 couple that with what the order would have
24 required. The order would have required MDEQ

1 and the City of Flint to go forward with
2 corrosion control. That corrosion control would
3 have been to treat a source that's notoriously
4 difficult to treat.

5 And we thought the best thing to
6 do was as quickly as possible, get the city to
7 go back on Detroit Water, which was beyond our
8 order authority.

9 So you add all that up together,
10 and we have a compelling case for doing exactly
11 what we were doing as opposed to issuing that
12 order.

13 Q. My original question to you,
14 though, was, what was the -- what is EPA's
15 position with respect to the earliest date that
16 it could have issued an emergency administrative
17 order under Section 1431 of the SDWA?

18 A. Could have. I'll underscore that
19 in your question. And I think the health data
20 that came to the fore in September of 2015 would
21 have made for an administrative record finding
22 that there were health impacts beyond what we
23 saw in the sampling data.

24 Q. And is this the data that was

1 necessary steps at the time pursuant to the
2 10-point plan.

3 Q. Okay. This is the State of
4 Michigan's 10-point plan that you've referenced
5 multiple times earlier in your deposition?

6 A. That's correct.

7 Q. Okay.

8 A. One thing I want to make clear,
9 though, is that EPA was very involved in the
10 issuance of that 10-point plan to the extent we
11 negotiated many of the parts of it.

12 So when people like Dr. Edwards
13 says we should take immediately -- should
14 immediately take decisive action to protect the
15 public, one of the things that we did was work
16 to make sure that that plan got implemented --
17 announced and implemented as quickly as
18 possible.

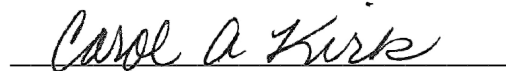
19 Q. I believe that you testified, if I
20 understood you correctly, earlier that the
21 earliest that you believe that the EPA could
22 have issued an Emergency Administrative Order
23 was in September after it had received the
24 results of the testing that had been conducted

CERTIFICATION

I, Carol A. Kirk, Registered Merit Reporter and Certified Shorthand Reporter, do hereby certify that prior to the commencement of the examination, ROBERT KAPLAN, was duly remotely sworn by me to testify to the truth, the whole truth, and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a verbatim transcript of the testimony as taken stenographically by me at the time, place, and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a relative nor an employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



Carol A. Kirk, RMR, CSR

Notary Public

Dated: January 28, 2022

Highly Confidential Robert Kaplan

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UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION

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		5:16-cv-10444
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		Hon, Judith E. Levy
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HIGHLY CONFIDENTIAL
Friday, January 14, 2022
Volume II

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GOLKOW LITIGATION SERVICES
877.370.3377 ph | 917.591.5672 fax
deps@golkow.com

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2 - - -

3 On behalf of the Class and Burgess Plaintiffs:

4 JULIE H. HURWITZ, ESQUIRE
GOODMAN, HURWITZ & JAMES, P.C.
5 1394 East Jefferson Avenue
Detroit, Michigan 48207
6 313-567-6170
jhurwitz@goodmanhurwitz.com

7
CARY S. MCGEHEE, ESQUIRE
8 PITT MCGEHEE PALMER BONANNI & RIVERS, PC
117 West Fourth Street, Suite 200
9 Royal Oak, Michigan 48067
cmcgehee@pittlawpc.com

10
LESLIE M. KROEGER, ESQUIRE
11 COHEN MILSTEIN SELLERS & TOLL PLLC
11780 U.S. Highway 1 North, Suite N500
12 Palm Beach Gardens, Florida 33408
561-515-1400
13 lkroeger@cohenmilstein.com

14
On behalf of Individual Plaintiffs:

15
DONALD H. DAWSON, JR., ESQUIRE
16 ALEC E. OHRYN, ESQUIRE
FIEGER LAW
17 19390 West Ten Mile Road
Southfield, Michigan 48075-2463
18 248-355-5555
d.dawson@fiegerlaw.com
19 aohryn@fiegerlaw.com

20
21
22
23
24

1 R E M O T E A P P E A R A N C E S (CONT'D)

2 - - -

3 On behalf of Individual Plaintiffs:

4 PATRICK LANCIOTTI, ESQUIRE
NAPOLI SHKOLNIK PLLC
5 400 Broadhollow Road, Suite 305
Melville, New York 11747
6 631-224-1133
planciotti@napolilaw.com

7

8 On behalf of the People of the State of Michigan:

9 CHARLES A. CAVANAGH, ASSISTANT ATTORNEY GENERAL
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
10 525 West Ottawa Street, 6th Floor
Lansing, Michigan 48909
11 517-335-7664
cavanaghc2@michigan.gov

12

13 On behalf of Defendants Veolia Water North America
Operating Services, LLC, Veolia North America, LLC,
14 and Veolia North America, Inc.:

15 CHRISTOPHER R. HOWE, ESQUIRE
CAMPBELL CONROY & O'NEIL, P.C.
16 1 Constitution Wharf, Suite 310
Boston, Massachusetts 02129
17 617-241-3000
chowe@campbell-trial-lawyers.com

18

SARAH E. BALKISSOON, ESQUIRE
19 MAYER BROWN, LLP
Two Palo Alto Square
20 3000 El Camino Real
Palo Alto, California 94306
21 650-331-2000
sbalkissoo@mayerbrown.com

22

23

24

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2 - - -

3 On behalf of Defendants Leo A. Daly Company and
4 Lockwood, Andrews & Newnam, Inc.:

5 PHILIP A. ERICKSON, ESQUIRE
6 PLUNKETT COONEY, P.C.
7 325 East Grand River
8 City Center, Suite 250
9 East Lansing, Michigan 48823
10 517-333-6598
11 perickson@plunketcooney.com

12
13
14 On behalf of McLaren Regional Medical Center:

15 SUSAN E. SMITH, ESQUIRE
16 BEVERIDGE & DIAMOND, P.C.
17 456 Montgomery Street, Suite 1800
18 San Francisco, California 94104
19 1-415-262-4000
20 ssmith@bdlaw.com

21
22 On behalf of the United States of America:

23 MICHAEL L. WILLIAMS, ESQUIRE
24 JASON T. COHEN, ESQUIRE
U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
175 N. Street, N.E.
Washington, D.C. 20002
202-307-3839
michael.l.williams@usdoj.gov
jason.t.cohen@usdoj.gov

25
26 Also Present:

27 Francis X. Ferrara, Veolia
28 Jeff Sindiong, Videographer

29
30 - - -

31

1 have much higher lead levels than the compliance
2 results indicated?

3 MR. ERICKSON: Object to the form.

4 A. I think after Dr. Edwards finished
5 his sequential sampling in September, the fact
6 that there were high lead levels in Flint was
7 borne out.

8 Q. So, in fact, the answer to my
9 question is yes, correct? Mr. Del Toral was
10 correct?

11 MR. ERICKSON: Object to the form.

12 MR. WILLIAMS: Objection as to
13 time frame.

14 Q. You can answer the question,
15 Mr. Kaplan.

16 A. So, again, Miguel says he's
17 concerned that the whole town may have much
18 higher lead levels than the compliance samples
19 indicate.

20 I know that Miguel was concerned
21 about the LCR sampling in general. And it's
22 always a concern that you can have much higher
23 lead levels than the compliance results
24 indicate.

1 Again, if we get into knowledge
2 about what the United States knew, after the
3 sample was completed by Dr. Edwards, it became
4 clear that there were high lead levels in Flint
5 as opposed to not just a single home.

6 I'd also point out that
7 Mr. Del Toral's e-mail was from April 25, and
8 four days later at a state director's meeting,
9 EPA did bring these concerns to the primacy
10 agency.

11 Q. And would you agree -- I want to
12 ask about the communications between Region 5
13 and MDEQ with respect to the requirement to use
14 corrosion control.

15 In Exhibit --

16 MS. HURWITZ: I don't remember the
17 exhibit number. The 2018 OIG report,
18 what exhibit number was that?

19 Can someone -- whatever exhibit
20 number it was.

21 A. I'm familiar with the OIG report.

22 Q. The OIG -- at the end of the --

23 MR. WILLIAMS: I'm sorry to
24 interrupt. I believe the 2000 OIG

1 sometime in July; is that right?

2 A. There was a series of meetings.

3 First, there was a call from Susan Hedman to the
4 mayor. Then there was a call on June 21st with
5 the head of our Office of Water -- or water
6 division director to her counterpart at MDEQ.

7 Q. Was that June 21st or July 21st?

8 A. That was July 21st.

9 Q. Right.

10 A. And then after that, what followed
11 in short order was MDEQ's commitment to flow
12 corrosion control, to order corrosion control.

13 What Miguel Del Toral has
14 testified to and is of record is that if you
15 order corrosion control, you need to do a
16 corrosion control study because it might affect
17 the parameters in the water adversely and
18 actually compound the problem.

19 So it's not something you do
20 immediately. You do it in considered fashion.
21 In fact, those are the steps that were skipped
22 in Flint in the first place, and he didn't want
23 that to happen again.

24 Q. And so, in fact, corrosion control

1 from that synergy.

2 Q. So when you say "five days later,"
3 you're saying by September 27 was when the state
4 of emergency was declared?

5 A. No. It was -- there was a
6 10-point plan. I don't have it in front of me.
7 But during the relevant time period,
8 Susan Hedman was working with high levels in
9 MDEQ and the governor's office on a number of
10 fronts.

11 First, the 10-point plan, which
12 was discussed in conjunction with EPA. And then
13 the most important thing -- and I need to stress
14 the importance of it -- was to switch back to a
15 finished water source from the Flint River.
16 That was something that could not be
17 accomplished by enforcement means and needed to
18 be accomplished by negotiation means.

19 Miguel Del Toral, when he wrote
20 the e-mail, had no knowledge of that switch and
21 had no knowledge of the 10-point plan. So I
22 fully agree that there are disconnects between
23 the two, but you need to read the two things
24 together in terms of a complete time frame.

1 control as quickly as possible.

2 So the urgency that we're speaking
3 of was about a potential violation. And I think
4 the phrase I used yesterday was the fact of the
5 agreement to flow corrosion control as quickly
6 as possible meant that the finding of violation
7 was overtaken by events.

8 The urgency around it was really
9 about ensuring that corrosion control happened
10 as quickly as possible, and that, in fact, was
11 an agreement with MDEQ, and MDEQ did honor that
12 agreement.

13 Q. So if I'm understanding your
14 testimony correctly, by July, your testimony is
15 that MDEQ backed off of its position that
16 corrosion control was not required and agreed to
17 order it?

18 A. Yes. So EPA and MDEQ reached an
19 agreement that meant corrosion control treatment
20 as soon as possible on July 21st, in an MDEQ and
21 Region 5 call that was memorialized in a
22 August 17 letter back to us.

23 Q. Isn't it also true, though, by
24 July of 2015, MDEQ was still taking the position

1 Mr. Del Toral's mind.

2 I'm asking, based on the plain
3 language of this e-mail, one could read --
4 anyone could understand or reach the conclusion
5 or have concerns that the EPA is more interested
6 in maintaining or more committed to maintaining
7 a partnership with the state than protecting
8 children?

9 A. It's an interpretation. I don't
10 think it's the most reasonable.

11 Q. Okay. Thank you.

12 So I assume -- I take it you do
13 not agree -- well, strike that.

14 By July of 2015, the EPA did have
15 the authority to take action. Would you agree
16 with that? Take further action than they took?

17 A. I don't know what you mean by
18 "action."

19 Q. They could have issued a TT and
20 started the process of moving toward
21 intervention under 1414 or 1431?

22 A. So I think there's an improper
23 conflating of the word "action" and enforcement
24 in terms of formal enforcement. EPA did take

1 action, and it was appropriate action. It was
2 to get corrosion control. The TT, as you
3 referred to it, would have been a violation, and
4 a violation would have led to an order to
5 correct the violation.

6 If you add up the time frames in
7 1414 and discount all the litigation risk, it
8 would have been long after EPA could have
9 accomplished the same thing by getting an
10 agreement with DEQ.

11 So EPA did take action, but EPA in
12 its considered discretion chose not to take a
13 treatment technique enforcement, 1414 violation
14 action.

15 Q. And would you agree that
16 Mr. Del Toral strongly disagreed with that?

17 A. I don't think Mr. Del Toral knew
18 what it was that we were doing. Again, I
19 testified earlier, and I incorporate by
20 reference my comments, about the disconnect in
21 communications and how that led to unfortunate
22 misperceptions at high levels of management and
23 at Mr. Del Toral's level.

24 Q. Who's Ed Moriarty?

1 specifically with water, we get everything from
2 citizen complaints to information in our SDWIS
3 database.

4 All I can say is that we handle it
5 appropriately. We send it to staff who
6 investigate all complaints no matter where they
7 come from and all evidence no matter where they
8 come from.

9 Q. Okay. Switching topics -- and
10 this is the last topic. You mentioned yesterday
11 that the timing of the emergency order was in
12 January 2016 because the relationship with both
13 the city and DEQ became fractious at that point;
14 is that correct?

15 A. Yes.

16 Q. Okay. And then you had listed
17 examples where the city had failed to deliver
18 information or testing results, sampling
19 results, to the task force.

20 I was wondering what, if any,
21 omissions or actions specifically attributed to
22 the DEQ factored into the EPA's timing of the
23 issuance of the emergency order.

24 A. I'd rely on the statement of

1 findings of fact that are within the order.

2 Some of the information that was available was
3 also available via MDEQ, and we needed MDEQ's
4 help in getting it from Flint. It was a joint
5 effort. I know both MDEQ and Flint were
6 involved.

7 I know that there were some delays
8 in the issuance of a permit with regard to the
9 flowing of orthophosphate, and we were
10 increasingly concerned that MDEQ needed to move
11 more quickly.

12 Up to that point, by which I mean
13 December, early December or on into January, the
14 relationship had been cooperative. When we
15 started to ask for further information, we found
16 that Flint principally, but also in some part
17 MDEQ, was not either providing the information
18 or assisting in getting Flint to provide the
19 information as quickly as we would have liked.

20 MR. CAVANAGH: Okay. That's all
21 the questions I have. Thanks for your
22 time.

23 THE WITNESS: Thank you.

24 MR. WILLIAMS: I'd like to ask you

1 a couple of questions, Mr. Kaplan. This
2 is Mike Williams.

3 - - -

4 REDIRECT EXAMINATION

5 BY MR. WILLIAMS:

6 Q. In 2015, EPA did consider issuing
7 a 1431 order, didn't it?

8 A. Yes. At all relevant times we had
9 1431 in front of mind at all levels, so -- go
10 ahead.

11 Q. And in EPA's deliberations about
12 whether or not to proceed with a 1431 order, did
13 Dr. Hedman or others within EPA have the view
14 that EPA would be prohibited from doing so based
15 on a jurisdictional bar?

16 A. No. That's not the case. In
17 conversations with Dr. Hedman, both
18 contemporaneously and then confirmed by my
19 recent conversation with her, the phrase
20 "jurisdictional bar" never came up.

21 Instead, I think the OIG used that
22 phrase improperly when it came from
23 Susan Hedman's congressional written testimony.
24 And what she was talking about was her fear,

1 since justified, that if EPA did issue a 1431,
2 Michigan would raise jurisdictional bars, in
3 other words, would challenge EPA's evidence
4 specifically with regard to state's failure to
5 protect human health.

6 So that jurisdictional bar
7 language from her testimony was not in context.
8 In fact, it was the opposite of what she
9 intended.

10 What she did raise, and was raised
11 at all relevant times, was elements in order to
12 plead the case and have it defensible, have it
13 defended by the Department of Justice and
14 prevail, we needed administrative record that
15 satisfied all elements of 1431.

16 Jurisdictional elements are
17 completely different than jurisdictional bar,
18 and the OIG was mistaken in their conclusion
19 with regard to jurisdictional bar.

20 Q. And so I believe this testimony
21 pertains to 30(b)(6) topic number 46, but
22 turning to topics 52(b) and (d), if either the
23 Office of the Inspector General of the United
24 States EPA or Governor Snyder's Flint Water

1 the LCR at some length and the issue of whether
2 or not a violation of the LCR occurred based on
3 the Flint water system not maintaining corrosion
4 control treatment after the water source switch
5 in April 2014.

6 My question is, did EPA make a
7 finding that a violation of the LCR occurred
8 based on the Flint water system not maintaining
9 corrosion control treatment after the water
10 source switch in April 2014?

11 A. "Finding" is a term of art in the
12 statute, and it's controlled by delegations.
13 And it's specifically not equated with
14 knowledge, but rather those delegated with
15 authority must make a finding in order to
16 proceed with a violation.

17 And the lowest level official that
18 was delegated with that authority was Tinka Hyde
19 as water division director, and she did not make
20 that finding.

21 Q. And to the extent, again --
22 turning to topics 52(b) and (d) -- if either of
23 the Office of the Inspector General of the
24 United States EPA or Governor Snyder's Flint

1 Water Advisory Task Force had concluded that the
2 EPA made such a finding, you would disagree as
3 contemplated by these topics; is that right?

4 A. Correct.

5 MR. WILLIAMS: Thank you. I have
6 no further questions at this time.

7 I will pause to inquire if other
8 counsel have further questions for this
9 witness.

10 A. I'm sorry to interrupt. I did
11 have one further comment with regard -- that I
12 didn't finish with regard to 1431. It's my
13 fault. I should have included it.

14 Q. Oh, please do explain.

15 A. So the question was with regard to
16 discretion, and I did talk about two people who
17 had delegation, but I didn't say who they were.
18 And I should have clarified that one was
19 Dr. Hedman who was at the time regional
20 administrator of EPA.

21 Another was Cynthia Giles who was
22 the assistant administrator for OECA. Those
23 were the people that were exercising discretion
24 and had it in mind throughout the whole time. I

1 should say that I did talk to both of them, and
2 both of them are officials of long experience
3 and had issued between them many, many, many
4 orders.

5 Susan, in particular, was
6 especially prescriptive in terms of her style.
7 She issued many public health orders in other
8 matters and orders to states.

9 And Cynthia Giles, I'd say the
10 same thing, had long experience in enforcement,
11 had also issued many orders.

12 And they certainly knew about and
13 were very familiar with, at all times, both the
14 1431 authority and their ability to effect
15 change with 1431.

16 They made a considered judgment
17 between them that the best course of action
18 throughout the summer and into December was to
19 continue to accomplish all their objectives
20 without use of 1431 until the balance shifted in
21 December, at which point they both decided that
22 1431 was the best course of action to accomplish
23 the remaining objectives.

24 MR. WILLIAMS: Thank you for that

CERTIFICATION

I, Carol A. Kirk, Registered Merit Reporter and Certified Shorthand Reporter, do hereby certify that prior to the commencement of the examination, ROBERT KAPLAN, was duly remotely sworn by me to testify to the truth, the whole truth, and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a verbatim transcript of the testimony as taken stenographically by me at the time, place, and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a relative nor an employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



Carol A. Kirk, RMR, CSR

Notary Public

Dated: January 28, 2022